* Together with No. 53, United States v. Kenny.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939 40

No. ~~965~~ 52

THE UNITED STATES OF AMERICA, APPELLANT

vs.

MAY HARRIS, ALIAS KITTY HARRIS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

FILED APRIL 12, 1940

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 905

THE UNITED STATES OF AMERICA, APPELLANT

vs.

MAY HARRIS, ALIAS KITTY HARRIS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

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1 In United States District Court for the District of New Jersey

UNITED STATES OF AMERICA,

v.

MAY HARRIS, ALIAS KITTY HARRIS, DEFENDANT

Indictment

Filed Oct. 17, 1939

In the District Court of the United States of America in and for the District of New Jersey, at the April Term thereof, in the year 1939.

The Grand Jurors of the United States of America duly impaneled, sworn, and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present,

1. That beginning in April and continuing up to and including the 12th day of September in the year 1939, at the City of Newark in the State and District of New Jersey, Frank B. Merritt, Asher Atkinson, Robert S. Johnson, James O'Connor, William C. Glassmann, Mrs. Essie Abeel, Samuel D. Metz, Edward C. Kern, Harry S. Allen, Charles McNair, Leslie D. Tasney, Dr. William I. Reed, Frank Lenz, John H. Birkett, Douglas S. Schenck, Thomas J. Corydon, Miss Margery Quigley, Mrs. Ruth L. Ballou, J. Johnson Kenyon, Mrs. Lillian D. Davis, Rev. George D. Hulst, George Young, and Mrs. Henrietta H. Hawes, were and continued to be good and lawful men and women of the said District of New Jersey then and there duly impaneled, sworn, and charged to inquire in and for the body of the said District of New Jersey and then and there composed and were the lawfully constituted Grand Jury of the United States of America in and for the said District of New Jersey for the April Term 1939, of the said District Court of the United States therein, the April 1939, Term of service of the said Grand Jury having been on the 6th

2 day of September in the year 1939 duly extended by order of Honorable Guy L. Fake, Judge of the said District Court, to from time to time and at such times as might be necessary and proper until the further order of the said Court, with full power and authority to hear and determine any matter brought before the said Grand Jury and to pass upon, find, sign, and return indictments and presentments into Court as the said Grand Jury should determine proper and lawful in matters already heard or partly heard but which the said Grand Jury would be unable to finish and have presented before the expiration of the said April

1939, Term of the said District Court as otherwise provided by law;

2. That then and there and theretofore there was exhibited to and given in charge to inquire by the said Grand Jury the question of what persons, if any, were engaged in the conducting of houses of prostitution and the conducting of other illegal enterprises and businesses at and in the City of Atlantic City, in the County of Atlantic and said State and District; what income was received by the proprietors of the said enterprises and businesses and the expenses incurred by each and to whom paid; the names of the persons to whom said proprietors had paid moneys for any purpose whatever; whether the persons to whom they had paid moneys had filed false and fraudulent individual income tax returns or had filed no individual income tax returns with intent to defraud the United States, or had paid income taxes for less than was due the United States, or had paid no income tax whatever when income tax was due the United States, for all or any part of the years 1930 to 1938, both inclusive, with the view that the said Grand Jury might in all cases disclosed to them by the evidence find and return true bills of indictments for violations of income tax laws of the United States, proven by the testimony to have been committed in the said City of Atlantic City, as to them seemed necessary and proper;

3. That on the said 11th day of October in the year 1939, at the City of Newark, in the County of Essex and State and District of New Jersey and within the jurisdiction of this
3 Court, the said Grand Jury being in lawful session and continuing their duties and inquiring of the matters and things more fully set out and described above and concerning which said person or persons, if any, had aided, abetted, and procured the filing of false and fraudulent income-tax returns, or had failed to file any income-tax returns whatever, with intent to defraud the United States of income tax for the years 1930 to 1938, both inclusive, or any or either of them, one May Harris, alias Kitty Harris, whose true and correct name, except as above set forth, is to the Grand Jurors unknown, came in her own proper person before the said Grand Jury then and there so in lawful session at the City of Newark aforesaid, as a witness into and concerning the inquiry then and there being conducted before the said Grand Jury in the matters aforesaid, and was duly sworn and took her corporal oath administered by William I. Reed, Foreman of the said Grand Jury, duly selected, named and appointed as such by the said Court, that the evidence which she, the said May Harris, should give before the said Grand Jury in the matter then depending would be the

truth, the whole truth and nothing but the truth, the said William I. Reed, as such Foreman of the said Grand Jury, having full power and authority and being a competent person to administer the said oath to the said May Harris in that behalf, the said inqury before the said Grand Jury being a case in which a law of the United States authorized an oath to be administered and the said Grand Jury then and there inquiring as aforesaid;

4. That in the said inquiry by and before the said Grand Jury it then and there became and was, among other things, material matter and question and material and proper to be inquired into by the said Grand Jury,

(a) if houses of prostitution operated in Atlantic City, New Jersey, during the years 1932 to 1937, inclusive;

(b) whether the proprietors of the said houses of prostitution received any permission or assurance from any person
4 holding any official position in Atlantic City or Atlantic County, or any other person, that they might conduct such businesses; the name of said person or persons and the particulars of said permission or assurance and the amounts necessary to be paid for the same;

(c) what amounts were actually paid by said proprietors for protection against raids, arrests or other molestation in the conduct of their business, by local police and other peace officers of Atlantic City or Atlantic County; the true amounts paid, to whom and for whom paid, and during what periods in the years 1932 to 1937, inclusive;

(d) whether one Harry Slott, also known as "Slotti" (deceased), received and collected from said proprietors of houses of prostitution or their employees money or envelopes for any purpose during the years 1932 to 1935, inclusive; and whether the said Harry Slott delivered such money or envelopes to one Raymond R. Born;

(e) whether one James J. McCullough, also known as "Mac," received and collected from said proprietors of houses of prostitution or their employees money or envelopes for any purpose during the years 1933 to 1936, inclusive; and whether the said James J. McCullough delivered such money or envelopes to said Raymond R. Born;

(f) whether one George Whitlock, also known as "Legs," received and collected from said proprietors of houses of prostitution or their employees money or envelopes for any purpose during the years 1936 and 1937; and whether the said George Whitlock delivered such money or envelopes to said Raymond R. Born;

(g) whether Raymond R. Born, political leader of the Third Ward, and Undersheriff of Atlantic County, New Jersey, gave permission to said proprietors of houses of prostitution to conduct such businesses and assured them of protection against raids, arrests or other molestation in the conduct of their business, by local police or other peace officers of Atlantic City or Atlantic County;

(h) whether, on October 27, 1937, or at any other time, the said May Harris went to the Federal Building in Trenton, New Jersey, and then and there told and informed Special Agents A. Dickstein, E. R. Davis and J. L. Brennan that in May of 1932 she went to Ray Born's home in her car in the Inlet District of Atlantic City, New Jersey, and said to Ray Born: "Everybody is open; how about me? I am back in 219; shall I turn on my lights?"; that before she left she said to Ray Born, "Shall I have to see you?", to which he replied, "Someone will come to you"; that immediately after her visit with Ray Born in his house, a man came to her place and told her he was the man she would have to see; that at the time she did not know him but immediately after she knew he was Harry Slatty (Slott); that he told her she would have to come to his place on Kentucky Avenue and that she went there every week and left $100 with him; that she did this because of her understanding in connection with the conversation she had with Ray Born in his cottage in the Inlet District; that in the spring of 1933 she wished to open a house of prostitution at 209 North North Carolina Avenue, Atlantic City and that she went to Enoch L. Johnson's apartment in the Ritz-Carlton Hotel to see Louis Kissel; that she said to Louis Kissel: "I know that Nuck is in here so please let me talk to him," and that Lou said: "Come in the room and sit down and wait"; and that while she was waiting in the room "Nuck" Johnson came in and she talked to him about what she wanted; that she said to "Nuck": "Will it be all right? I would like to bring my sister back and I would like to open up 209 for her," and that "Nuck" said to her: "You wait here for Lou and you talk it over with Lou and whatever Lou tells you to do will be all right"; that she opened a house of prostitution at 29 North Michigan Avenue and that she was ordered to close after being open only a few days; that she went to see Ray Born at Turner Hall and after some effort was able to contact him on the telephone and demanded that he wait at Turner Hall until she got there; that when she saw him she said: "I don't know who is the cause, I don't care who is the cause, I am tired of being tossed around; why should I be closed and why should these niggers get all of a sudden so particular? I am satisfied that 15 North Michigan is the cause and if I don't open those women better get

closed up"; and that Ray Born said: "Go on hom'; don't get excited; I am trying to straighten you out"; that shortly after her house and "Poppy's" house were allowed to open in the summer of 1936 this collector, Jimmie McCullough, stopped coming but instead another man, George Whitlock, also known as "Legs," came around to collect;

5. That on the 17th day of October in the year 1939, at the City of Newark aforesaid, in the County, State, and District aforesaid, and within the jurisdiction of this Court, the said May Harris, alias Kitty Harris, being so duly sworn as aforesaid, contriving and intending to pervert the true course of justice before the said Grand Jury and upon the said inquiry, and touching and concerning the material matters and the truth of the material matters so being inquired of by the said Grand Jury, upon and contrary to her said oath, falsely, wickedly, maliciously, corruptly, wilfully, and feloniously, not believing the same to be true and well knowing the same to be untrue, did answer, testify, declare, depose, and swear, among other things, in substance and to the effect following (said questions then and there being propounded by Joseph W. Burns and the answers hereinafter set forth being given by said May Harris):

Q. Now, in October 1937, or thereabouts, did you say to agents Dickstein, Brennan, and Davis or any of those three that in May of 1932 you went to Ray Born's home in your car in
7 the Inlet District of Atlantic City, N. J.; that you said to Ray Born, "Everybody is open; how about me? I am back in 219; shall I turn on my lights?" Did you say that to the agents?

A. I couldn't have; I was closed in 1932.

Q. Well, did you say this to the agents, that at the time you did not know his name, but immediately after you knew he was Harry Slottery, he told you that you would have to come to his place, he gave you the address, that you went on every Monday to his little store on Kentucky Avenue and left with him $100 a week?

A. I don't seem to remember me being in that store over once or twice, but I have been in that store.

Q. The question is did you tell that to the agents?

A. I might have had; I don't remember; I might have had.

Q. Well, is it the truth that you did go to Kentucky Avenue?

A. I did go to Kentucky Avenue two or three times.

Q. Did you say this to the agents, that you went to Kentucky Avenue because of your understanding in connection with the conversation you had with Ray Born in his cottage in the Inlet District?

A. No. This man told me to go to his office, to his place, his store; it was this man himself that told me. I had seen the man.

Q. Well, did you go to Johnson's apartment in the Ritz Carlton at any time to see Lou Kissel?

A. To see Lou Kissel himself?

Q. Yes.

A. No.

Q. Did you tell the F. B. I. agent in 1937 that you had gone to Johnson's apartment in the Ritz Carlton to see Lou Kissel?

A. No; the F. B. I. agents was trying to tell me that I had.

Q. You didn't say that to them?

A. No.

8 Q. Did you say to the F. B. I. agents that you went to the Ritz Carlton in reference to 209 and said to Lou, "I know that Nuck is in here so please let me talk to him," and that Lou said, "Come in the room and sit down and wait," and that while you were in the room waiting, Nuck Johnson came in and you talked to him about what you wanted; that you said to Nuck, "Will it be all right? I would like to bring my sister back and I would like to open up 209 for her" and that Nuck said to you, "You wait here for Lou and you talk it over with Lou and whatever Lou tells you to do will be all right?" Did you tell that to the F. B. I.?

A. I don't remember no such conversation, because if I wanted to bring my sister back, it seems to me this very second that the proper person to have that conversation would be to the man that took my money.

Q. Well, did you say this to the agents after you talked about the colored attorney and the colored people, that within a few days you went to see Ray Born at Turner Hall, and after some effort was able to contact him on the telephone and demanded that he wait at Turner Hall until you got there; that a few minutes later you saw him and said, "I don't know who is the cause, I don't care who is the cause, I am tired of being tossed around; why should I be closed and why should these niggers get all of a sudden so particular? I am satisfied that 15 North Michigan is the cause and if I don't open those women better get closed up and that Ray Born said, "Go on home; don't get excited; I am trying to straighten you out." That the next day the lights at 15 North Michigan Avenue were out. Did you say that to the F. B. I. agents?

A. I was never in Turners Hall.

Q. Did you tell the agents that you were in Turners Hall?

A. Why would I tell the agents about something that I didn't do?

Q. I am asking if you did.

A. I couldn't have. I have never been in Turners Hall.

Q. You didn't tell that to the agents?

A. I couldn't have; I don't see how I could.

Q. Did you tell the agents that you had this conversation with Ray Born?

A. I didn't have a conversation with Ray Born.

Q. Did you tell the agents that you had that conversation with Ray Born?

A. I don't see how I would. I wouldn't tell the F. B. I. agents something that didn't happen to be effective about it. I have never been in Turners Hall; why would I tell them that I had been?

Q. Did you say this to the agents, that shortly after your house and Poppy's house were allowed to open in the summer of 1936 a young man who you were told by the agents was James McCullough, but whose name you did not know at the time, came to your house; that you recognized him as being a man whom you had seen at Slotty's place on North Kentucky Avenue when you previously made payments there for your houses on North North Carolina Avenue; that this young man said to you, "Do you want to see me today?" That you said, "I will see you Sunday and every Sunday; I prefer Sunday." Did you say that to the agents?

A. Couldn't of. The first time that I saw this boy that you all call McCullough was right here in this hall outside of this door this last month some time.

Q. Well, now, on——

A. I have never known his name; when I went to the bank I didn't know his name.

Q. Now, in Trenton, N. J. in October 1937 at a time when the F. B. I. agents were questioning you, didn't they bring in or didn't they show to you this same James McCullough whom you say you knew from the bank and whom you saw in this post office in Newark, and didn't you at that time say that you recognized him as being the same man that collected the money?

A. In Trenton, New Jersey, Mr. Burns?

Q. Will you answer the question?

A. Yes; I am going to answer you if you will let me. In Trenton, N. J., they showed me a man, they showed me many men, this particular man that they showed me, that I said looked like this McCullough afterwards at Camden, N. J., at the trial turned out to be Agnes Stein's chauffeur. This boy McCullough when he was finally proved to me who he was, was in this build-

ing here outside of that door, and it was not the man they showed me in Trenton. I never knew this boy only from that bank.

Q. Well, do you deny that those agents showed to you——

A. They showed me many men, but they didn't show me this same boy; no; they did not.

Q. You deny that the agents showed to you the same James McCullough that you were shown by the agents in this building?

A. They might have shown me him in those halls; there were many, many men.

Q. Didn't you tell these agents on October 27, 1937, or if you don't remember the date, didn't you tell the agents about that time that you recognized James McCullough as a man who collected the money?

A. I told them that this man that I thought looked like the man I had seen in this man's office—after that I discovered that it was not the man and it was this woman's driver. In this hall here when they really showed me the boy, then it was not the man I saw in Trenton.

Q. Did you tell the F. B. I. agent in Trenton in 1937 that in about the fall of 1936 the collector who you then knew, that is in 1937, knew as Jimmy McCullough, stopped coming but instead another man came to you known as George Whitlock, also known as Legs; that he came to 29 North Michigan and said to you, "I am the fellow; the little fellow won't come here any more." That you said, "All right, I will see you Sunday." Did you say that to the F. B. I. agents?

A. Why, I couldn't of. I never give my money to no little fellow. I gave my money to Legs. I didn't know his name until they have established that since.

6. And the grand jurors aforesaid, upon their oaths aforesaid, do say that the said, "May Harris, alias Kitty Harris, at the said City of Newark, in the County, State, and District aforesaid, at the times she made the statements aforesaid, then and there well and fully knew that they were, as a matter of fact, false and untrue in that, and for the reason that, May Harris aforesaid then and there well and fully knew that she did in fact tell and inform the said Special Agents, A. Dickstein, E. R. Davis, and J. L. Brennan that she had gone to Ray Born in 1932 and talked to him about opening a house of prostitution at 219 North Carolina Avenue; that she had spoken to Lou Kissel at the Ritz Carlton Hotel and at 110 South Iowa Avenue in Atlantic City, New Jersey; that she had paid money to said James McCullough and had spoken to Ray Born after her place was closed at 29 North Michigan Avenue."

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

JOHN J. QUINN,
John J. Quinn,
United States Attorney.

A true bill:
WM. I. REED,
Foreman.

[File endorsement omitted.]

12 In United States District Court, District of New Jersey

[Title omitted.]

Notice of motion to quash indictment

Filed Jan. 16, 1940

To: JOHN J. QUINN, UNITED STATES DISTRICT ATTORNEY FOR THE DISTRICT OF NEW JERSEY.

Take notice that on Tuesday, January 16, 1940, at the United States District Court in the Post Office Building, Camden, New Jersey, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall move before the Honorable John Boyd Avis, Judge of said United States District Court, for an order quashing the indictment in the above-entitled cause on the ground that the same does not charge an offense against the United States.

Very truly yours,

GEORGE R. SOMMER,
George R. Sommer,
Attorney for Defendant.

[File endorsement omitted.]

14 In United States District Court, District of New Jersey

On Indictment. 8911b. On motion of Defendant to Quash

UNITED STATES OF AMERICA
vs.
MAY HARRIS, ALIAS KITTY HARRIS, DEFENDANT

George R. Sommer, for th motion.
John J. Quinn (United States Attorney), Joseph W. Burns (Special Assistant U. S. Attorney), opposed.

Opinion

Filed Feb. 14, 1940

Avis, District Judge: Defendant, through her attorney, moves to quash the indictment returned in this case, upon the ground that it does not charge an offense against the United States.

The indictment charges the defendant with having committed perjury in violation of the statute, 18 U. S. C. A., sec. 231.

The specific charge is that defendant, on October 17, 1939, was called as a witness before the United States Grand Jury for the District of New Jersey, at Newark, duly sworn, and gave certain testimony, and was particularly interrogated as to statements made to F. B. I. agents in 1937. The defendant denied categorically that these alleged statements were made by her.

The allegation of the indictment is that—

15 "May Harris, alias Kitty Harris, at the said City of Newark, in the County, State and District aforesaid, at the times she made the statements aforesaid, then and there well and fully knew that they were, as a matter of fact false and untrue in that, and for the reason that, May Harris aforesaid then and there well and fully knew that she did in fact tell and inform the said Special Agents, A. Dickstein, E. R. Davis, and J. L. Brennan that she had gone to Ray Born in 1932 and talked to him about opening a house of prostitution at 219 North North Carolina Avenue; that she had spoken to Lou Kiesel at the Ritz Carlton Hotel and at 110 South Iowa Avenue in Atlantic City, New Jersey; that she had paid money to said James McCullough and had spoken to Ray Born after her place was closed at 29 North Michigan Avenue."

The Government, by its Attorney, admits and states that its case is based entirely upon the fact that defendant, as a witness before the Grand Jury, denied that she made certain statements to the agents, whereas in fact she did make such statements. In other words, the Government insists that the indictment should be upheld, although no direct proof of the falsity or truth of the testimony given before the Grand Jury is available, except the testimony of agents who will testify that, at a prior meeting, the defendant told them as facts, the statements contained in the questions submitted to defendant before the Grand Jury.

Counsel for defendant claims that under such an allegation the indictment cannot be sustained; that to allege or prove perjury it must be shown that the substance of the statements of defendant were untrue in fact, and that defendant cannot be convicted of perjury because her sworn testimony was in conflict with an alleged statement made by her on a former date.

Undoubtedly at the time the testimony was given the Grand Jury was regularly convened and the witness duly sworn, or so it is alleged in the indictment.

I am satisfied that, under the terms of the indictment,
16 the questions asked of defendant were material to the issue there being investigated.

Perjury is a serious offense, and a person who commits perjury is entitled to severe condemnation. The courts and other bodies depending upon facts for adjustment of controversies, or obtaining facts by investigation, are powerless to render proper determinations unless persons in testifying tell the truth to the best of their knowledge. However, by reason of the seriousness of the charge and its peculiar attributes, it is required that perjury be proven by the testimony of two credible witnesses, or one credible witness with corroboration, or circumstances sustained by clear and convincing proof.

While there are some cases which appear to be to the contrary, I am satisfied that the allegations in an indictment necessary to show the commission of the offense must charge that the testimony given was untrue in fact, and that perjury cannot be predicated upon a contrary statement made by the witness at a time prior to or after the making of the sworn statement, notwithstanding the claim that the witness on her oath denied that she made such statements, which, it is averred, can be proven by two or more credible witnesses.

In the case of Clayton v. United States, 4 Circ. 284 F. 537, the court said on page 540:

"In the case at bar no attempt was made to prove by 'positive and direct evidence' that defendant made false answers to the first two questions set out in the indictment, namely, whether he had procured any intoxicating liquor from any person during the period named, and whether he had had any intoxicating liquor in his possession during that period. Indeed, the only evidence in support of these assignments is the testimony of two witnesses as to what defendant had told them in private conversation some time before the grand jury met. This was quite insufficient, for the falsity of a sworn statement is not shown by proof of
17 an unsworn contradictory statement. In view of the strong presumption of innocence, and because of the solemnity of an oath, credit must be given to what defendant said under oath, rather than to what he may have said to the contrary when not under oath. Billingsley v. State, 49 Tex. Cr. R. 620, 95 S. W. 520, 13 Ann. Cas. 730, 21 R. C. L. 272; 30 Cyc. 1455; Wharton's Crim. Ev. sec. 387."

In Phair *v.* United States, 60 F. 2d 953, the Circuit Court of Appeals for the Third Circuit, in a case appealed from a judg-

ment rendered in the District Court of the United States for the district of New Jersey, established the same principle.

In that case Phair was alleged to have subscribed and sworn to an affidavit with relation to the ownership of a certain saloon wherein intoxicating liquor was kept and sold. In the affidavit he denied ownership. It was charged that later in another proceeding Phair admitted ownership. There was some question as to whether the admission referred to the exact property referred to in the affidavit, but, however that may be, the court stated the law applicable to the instant motion as follows on page 954:

"But assuming that Mr. Cohen, and not the other witnesses, correctly stated what Phair said, it simply amounts to an affidavit on the one side and contrary oral statements by the same person on the other. The affidavit and the later statements cannot both be true, and which one is true is unknown, for there are no corroborating circumstances sufficient to establish the truth of the statements contradicting the affidavit.

* * * * * *

"At most, there was an oath on the one side, and conflicting testimony as to what Phair later said contrary thereto, on the other, without sufficient attending circumstances. If all three witnesses had unequivocally testified that Phair later flatly denied the truth of the statements made in his affidavit, the result would have been an affidavit by Phair and a subsequent denial of it by him. All that the testimony of the three witnesses amounts to is the establishment of a denial by Phair of his affidavit, and the mere denial of the truth of the affidavit is not sufficient to sustain the charge of perjury."

18 The case of United States v. Golan, D. C., 24 F. Supp. 523, decided by Judge Maris, then Circuit Judge, but determining a motion for a new trial in a case in which he had sat as a District Judge, held as follows on pages 523–4:

"Turning to a consideration of the common law of Pennsylvania I find it to be settled that two or more contradictory statements of a defendant standing alone will not sustain a charge of perjury. Com. v. Bradley, 109 Pa. Super. 294, 167 A. 471. Before a defendant may be convicted upon his admission that a prior statement under oath was false it is necessary to establish the corpus delicti, that is, the falsity of the defendant's prior sworn statement. Com. v. Haines, 130 Pa. Super. 196, 196 A. 621.

"In the present case the Government offered evidence proving that the defendant gave the testimony and made the affidavit in his naturalization proceeding which it contended were false. It then offered in evidence certain admissions by the defendant

that this testimony and affidavit were false. No other evidence as to their falsity was produced, however, and I submitted the case to the jury upon the contradictory statements of the defendant alone and over his objection that the corpus delicti had not been proved. I am satisfied that this was error and that I should have sustained the defendant's motion for a directed verdict of not guilty."

These cases are convincing as to the rule established in this Circuit, and it is my duty to follow the rule so established.

The Government relies mainly upon two cases: The first, O'Brien v. United States, C. A. D. C., 99 F. 2d 368. While it is true in that case the court sustained a conviction based upon the making of contradictory statements, the question as to whether that constituted perjury was not raised or decided. The first question decided was whether the statement, made by defendant, which constituted the proof of perjury had been procured by promises and threats. The second, an alleged commission of error by the trial court in permitting the stenographer who recorded the original statement to read to the jury those
19 parts of it which proved the defendant's commission of other criminal offenses; and the third related to the imposition of sentence, as to whether defendant should have been sentenced under the District of Columbia Code or the Federal Penal Code. It is not a precedent for the contention. Petition for writ of certiorari to the Supreme Court was filed, including a motion to proceed in forma pauperis, which motion was denied (see 305 U. S. 562). Apparently no further proceedings were taken in the Supreme Court.

The second case is Behrle v. United States, C. A. D. C. 100 F. 2d 714. That case seems to be exactly in point, following the doctrine established in the case of People v. Doody, 172 N. Y. 165, 64 N. E. 807.

In both of these cases the courts apparently relied upon the principle that perjury can be proved by so-called circumstantial evidence. I cannot believe that the courts can make new law on this subject, when for so many years it has been held otherwise.

The motion to quash will be granted.

* * * * *

[File endorsement omitted.]

20 In United States District Court, District of New Jersey

On Indictment. 8911b

UNITED STATES OF AMERICA

vs.

MAY HARRIS, ALIAS KITTY HARRIS, DEFENDANT

Order quashing indictment

Filed March 18, 1940

The above entitled cause having been opened to the Court on the motion of George R. Sommer, Esquire, appearing for and on behalf of the defendant May Harris to quash the indictment; and Joseph W. Burns, Special Assistant United States Attorney for the District of New Jersey, having appeared for and on behalf of the United States of America; and,

The Court having heard and considered the arguments of counsel and having determined that the indictment does not charge an offense under the statute;

It is, therefore, ordered that the said indictment be quashed.

JOHN BOYD AVIS,
Judge, United States District Court.

Entered this 18th day of March 1940.

21 In United States District Court, District of New Jersey

[Title omitted.]

Petition for appeal

Filed March 20, 1940

Comes now the United States of America, plaintiff herein, and states that on the 18th day of March, 1940, the District Court for the District of New Jersey sustained a motion of the defendant to quash the indictment herein, and the United States of America feeling aggrieved at the ruling of said District Court in sustaining said motion to quash, prays that it may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a transcript of the record in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA,
JOHN J. QUINN,
United States Attorney for the District of New Jersey.
JOSEPH W. BURNS,
Special Assistant to the United States Attorney.

[File endorsement omitted.]

22 In United States District Court, District of New Jersey

[Title omitted.]

Assignments of error

Filed March 20, 1940

Comes now the United States of America, by John J. Quinn, United States Attorney for the District of New Jersey, and avers that in the record proceedings and judgments herein there is manifest error and against the just rights of the said plaintiff in this, to wit:

1. That the court erred in quashing the indictment.
2. That the court erred in holding that the indictment did not charge an offense under the Perjury Statute.
3. That the court erred in holding that a false denial under oath by a witness before a grand jury that she had theretofore made certain statements to Government agents did not constitute a violation of the Perjury Statute, even though the fact that she had made the statements was material to the Grand Jury's inquiry.

JOHN J. QUINN,
United States Attorney for the District of New Jersey.
JOSEPH W. BURNS,
Special Assistant to the United States Attorney.

[File endorsement omitted.]

23 In United States District Court, District of New Jersey

[Title omitted.]

Order allowing appeal to the Supreme Court of the United States

Filed March 20, 1940

This cause having come on this day before the Court on Petition of the United States of America, plaintiff herein, praying an

appeal to the Supreme Court of the United States for a reversal of the judgment sustaining a motion of the defendant to quash the indictment in said cause, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said motion, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court, Ordered and Adjudged that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this Court, in sustaining the motion of the defendant to quash the indictment, to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court.

It is further Ordered that the United States of America be, and it is hereby, permitted a period of forty days in which to file and docket said appeal in the Supreme Court of the United States.

Dated at Camden, New Jersey, this 20th day of March 1940.

By the Court:

JOHN BOYD AVIS,
United States District Judge for the District of New Jersey.

[File endorsement omitted.]

24 In United States District Court, District of New Jersey

[Title omitted.]

Praecipe for Transcript of Record

Filed April 3, 1940

TO THE CLERK, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY:

The appellant hereby directs that in preparing the transcript of the record in this cause in the United States District Court for the District of New Jersey in connection with its appeal to the Supreme Court of the United States you include the following:

1. Indictment.
2. Notice of and motion to quash.
3. Opinion.
4. Judgment sustaining motion to quash.
5. Petition for appeal to the Supreme Court.
6. Statement of jurisdiction of Supreme Court.
7. Assignments of error.
8. Order allowing appeal.

9. Notice of service on appellee of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.
10. Citation.
11. Praecipe.

(Signed) JOHN J. QUINN,
United States Attorney for the District of New Jersey.
JOSEPH W. BURNS,
Special Assistant to the United States Attorney.

Service of the foregoing Praecipe for Transcript of Record is acknowledged this 25th day of March 1940.

(Signed) GEORGE R. SOMMER,
Attorney for defendant.

26 [Citation in usual form showing service on George R. Sommer, filed April 23, 1940, omitted in printing.]
27 [Clerk's certificate to foregoing transcript omitted in printing.]

28 In Supreme Court of the United States

Statement of points to be relied upon and designation of record

Filed April 27, 1940

Pursuant to Rule XIII, Paragraph 9, of this Court, appellant states that it intends to rely upon all of the points in its assignment of errors.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

FRANCIS BIDDLE,
Francis Biddle,
Solicitor General.

APRIL 20TH, 1940.

Service of the above Statement of Points and Designation of Record acknowledged this 22 day of April 1940.

GEORGE R. SOMMER,
Counsel for Appellee.

[File endorsement omitted.]

[Endorsement on cover:] File No. 44312. NEW JERSEY, D. C. U. S. Term No. 905. The United States of America, Appellant, *vs.* May Harris, alias Kitty Harris. Filed April 12, 1940. Term No. 905 O. T. 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939 40

No. ~~906~~ 53

THE UNITED STATES OF AMERICA, APPELLANT

vs.

MARIE KENNY, ALIAS MARIE RICKERT, ALIAS MAE KELLY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

FILED APRIL 12, 1940

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 906

THE UNITED STATES OF AMERICA, APPELLANT

vs.

MARIE KENNY, ALIAS MARIE RICKERT, ALIAS MAE KELLY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

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1 In United States District Court for the District of New Jersey

UNITED STATES OF AMERICA

v.

MARIE KENNY, ALIAS MARIE RICKERT, ALIAS MAE KELLY,
DEFENDANT

Indictment

Filed Oct. 11, 1939

In the District Court of the United States of America in and for the District of New Jersey, at the April Term thereof, in the year 1939.

The Grand Jurors of the United States of America duly impaneled, sworn and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present,

1. That on the 8th day of August and on various other days and dates up to and including the 12th day of September in the year 1939, at the City of Newark in the State and District of New Jersey, Frank B. Merritt, Asher Atkinson, Robert S. Johnson, James O'Connor, William C. Glassmann, Mrs. Essie Abeel, Samuel D. Metz, Edward C. Kern, Harry S. Allen, Charles McNair, Leslie D. Tasney, Dr. William I. Reed, Frank Lenz, John H. Birkett, Douglas S. Schenck, Thomas J. Corydon, Miss Margery Quigley, Mrs. Ruth L. Ballou, J. Johnson Kenyon, Mrs. Lillian D. Davis, Rev. George D. Hulst, George Young, and Mrs. Henrietta H. Hawes, were and continued to be good and lawful men and women of the said District of New Jersey then and there duly impaneled, sworn and charged to inquire in and for the body of the said District of New Jersey and then and there composed and were the lawfully constituted Grand Jury of the United States of America in and for the said District of New Jersey for the April Term, 1939, of the said District Court of the United States therein, the April, 1939, Term of service of the said Grand Jury having been on the 6th day of
2 September in the year 1939 duly extended by order of Honorable Guy L. Fake, Judge of the said District Court, to from time to time and at such times as might be necessary and proper until the further order of the said Court, with full power and authority to hear and determine any matter brought before the said Grand Jury and to pass upon, find, sign, and return indictments and presentments into Court as the said Grand Jury should determine proper and lawful in matters already heard or partly heard but which the said Grand Jury would be

unable to finish and have presented before the expiration of the said April 1939 Term of the said District Court as otherwise provided by law;

2. That then and there and theretofore there was exhibited to and given in charge to inquire by the said Grand Jury the question of what persons, if any, were engaged in the conducting of houses of prostitution and the conducting of other illegal enterprises and businesses at and in the City of Atlantic City, in the County of Atlantic and said State and District; what income was received by the proprietors of the said enterprises and businesses and the expenses incurred by each and to whom paid; the names of the persons to whom said proprietors had paid moneys for any purpose whatever; whether the persons to whom they had paid moneys had filed false and fraudulent individual income tax returns or had filed no individual income tax returns with intent to defraud the United States, or had paid income taxes for less than was due the United States, or had paid no income tax whatever when income tax was due the United States, for all or any part of the years 1930 to 1938, both inclusive, with the view that the said Grand Jury might in all cases disclosed to them by the evidence find and return true bills of indictments for violations of income tax laws of the United States, proven by the testimony to have been committed in the said City of Atlantic City, as to them seemed necessary and proper;

3. That on the said 8th day of August in the year 1939, at the City of Newark, in the County of Essex and State and
3 District of New Jersey and within the jurisdiction of this Court, the said Grand Jury being in lawful session and continuing their duties and inquiring of the matters and things more fully set out and described above and concerning which said person or persons, if any, had aided, abetted and procured the filing of false and fraudulent income tax returns, or had failed to file any income tax returns whatever, with intent to defraud the United States of income tax for the years 1930 to 1938, both inclusive, or any or either of them, one Marie Kenny, alias Marie Rickert, alias Mae Kelly, whose true and correct name, except as above set forth, is to the Grand Jurors unknown, came in her own proper person before the said Grand Jury then and there so in lawful session at the City of Newark aforesaid, as a witness into and concerning the inquiry then and there being conducted before the said Grand Jury in the matters aforesaid, and was duly sworn and took her corporal oath administered by William I. Reed, Foreman of the said Grand Jury, duly selected, named and appointed as such by the said Court, that the evidence which she, the said Marie Kenny, should give before the said Grand Jury in the matter then depending would be the truth, the whole

truth and nothing but the truth, the said William I. Reed, as such Foreman of the said Grand Jury, having full power and authority and being a competent person to administer the said oath to the said Marie Kenny in that behalf, the said inquiry before the said Grand Jury being a case in which a law of the United States authorized an oath to be administered and the said Grand Jury then and there inquiring as aforesaid;

4. That in the said inquiry by and before the said Grand Jury it then and there became and was, among other things, material matter and question and material and proper to be inquired into by the said Grand Jury,

(a) if houses of prostitution operated in Atlantic City, New Jersey, during the years 1932 to 1937, inclusive;

(b) whether the proprietors of the said houses of prostitution received any permission or assurance from any person
4 holding any official position in Atlantic City or Atlantic County, or any other person, that they might conduct such businesses; the name of said person or persons and the particulars of said permission or assurance and the amounts necessary to be paid for the same;

(c) what amounts were actually paid by said proprietors for protection against raids, arrests, or other molestation in the conduct of their business, by local police and other peace officers of Atlantic City or Atlantic County; the true amounts paid, to whom and for whom paid, and during what periods in the years 1932 to 1937, inclusive;

(d) whether one Harry Slott, also known as "Slotti" (deceased), received and collected from said proprietors of houses of prostitution or their employees money or envelopes for any purpose during the years 1932 to 1935, inclusive; and whether the said Harry Slott delivered such money or envelopes to one Raymond R. Born;

(e) whether one James J. McCullough, also known as "Mac," received and collected from said proprietors of houses of prostitution or their employees money or envelopes for any purpose during the years 1933 to 1936, inclusive; and whether the said James J. McCullough delivered such money or envelopes to said Raymond R. Born;

(f) whether one George Whitlock, also known as "Legs," received and collected from said proprietors of houses of prostitution or their employees money or envelopes for any purpose during the years 1936 and 1937; and whether the said George Whitlock delivered such money or envelopes to said Haymond R. Born;

(g) whether Raymond R. Born, political leader of the Third Ward, and Undersheriff of Atlantic County, New Jersey, gave

permission to said proprietors of houses of prostitution to conduct such businesses and assured them of protection against raids, arrests or other molestation in the conduct of their businesses in Atlantic City, New Jersey, by local police and other peace officers of the said City of Atlantic City or Atlantic County;

(h) whether said Raymond R. Born received income from said proprietors of houses of prostitution for such permission, assurance, and protection which he failed to report in his Federal income tax returns;

(i) whether in November 1937, the said Marie Kenny, alias Marie Rickert, alias Mae Kelly went to the Post Office Building in Atlantic City, New Jersey, and then and there told and informed Special Agent William E. Frank and Revenue Agent Walter Doxon, Jr. that in 1935 she had gone to Ray Born, leader of the Third Ward, for permission to open a house of prostitution on Indiana Avenue in Atlantic City; that Born had given her permission to operate at said address; that she went to considerable expense to remodel the house; that due to complaints of neighbors she had to move, and received permission from Born to open on Illinois Avenue; that Born told her she would have to pay fifty dollars ($50) a week in the winter months and one hundred dollars ($100) a week in the summer months; that she paid said amounts to a little fellow called "Mac," and then to a tall fellow called "Legs."

5. That on the said 8th day of August in the year 1939, at the City of Newark aforesaid, in the County, State, and District aforesaid, and within the jurisdiction of this Court, the said Marie Kenny, alias Marie Rickert, alias Mae Kelly, being so duly sworn as aforesaid, contriving, and intending to pervert the true course of justice before the said Grand Jury and upon the said inquiry, and touching and concerning the material matters and the truth of the material matters so being inquired of by the said Grand Jury, upon and contrary to her said oath, falsely, wickedly, maliciously, corruptly, wilfully, and feloniously, not believing the same to be true and well knowing the same to be untrue, did answer, testify, declare, depose, and swear, among other things, in substance and to the effect following (said questions then and there being propounded by William E. Frank and Joseph W. Burns and the answers hereinafter set forth being given by said Marie Kenny):

By Mr. FRANK:

Q. Well, don't you recall at that time that you told me that you had gone to Ray Born for permission to open a house?

A. I did not. I didn't mention—because after all, I do know law. I told you I had been indicted.

Q. You never told me?

A. No; I didn't. That's the reason I said, "If you want to ask me anything or to sign that paper, you should send it to my attorney," and if he said I should do it, naturally I would do it, because I had only become indicted.

By Mr. BURNS:

Q. Mrs. Kenny, do you mean to tell this Grand Jury that when Special Agent Frank was questioning you, you didn't tell him that you asked Ray Born for permission to open?

A. I did not.

Q. Didn't he ask you whether or not you had any expenses for protection, and didn't you tell him about the $50 and $100, and also say that you started the house after speaking to Ray Born?

A. No; I didn't. I said I put it in an envelope, told him what it was, told him that I put $50 like in the winter and $100 in the summer, and then he asked me something about other donations,
like for charity, and I tried to the best of my ability to
7 tell him the amount, which was something I really couldn't exactly tell, because sometimes there was a lot and sometimes a little, but I never answered that question at that time to Mr. what's-his-name, because after all, I did know my statue at that time.

6. And the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Marie Kenny, alias Marie Rickert, alias Mae Kelly, at the said City of Newark, in the county, State, and District aforesaid, at the times she made the statements aforesaid then and there well and fully knew that they were, as a matter of fact, false and untrue in that, and for the reason that, Marie Kenny aforesaid then and there well and fully knew that she did in fact tell and inform the said Special Agent William E. Frank and Revenue Agent Walter Doxon, Jr. that she had gone to Ray Born for permission to open a house of prostitution in Atlantic City, New Jersey, and that she operated such a house after speaking to Ray Born in 1935.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Section 231, Title 18, United States Code.)

JOHN J. QUINN,
John J. Quinn,
United States Attorney.

A True Bill:

WM. I. REED,
Foreman.

OCTOBER 1939.

[File endorsement omitted.]

8 In United States District Court, District of New Jersey

[Title omitted.]

Notice of Motion to require United States Attorney to move trial of indictment, etc.

Filed Feb. 21, 1940

To Hon. JOHN J. QUINN,
United States Attorney.

SIR: Please take notice that on Tuesday, February 27th, 1940, at ten o'clock in the forenoon of said day, at the United States Court House, Camden, New Jersey, I shall move the Court to require the United States Attorney to move the trial of the indictment in the above-entitled matter or make other final disposition thereof.

JAMES MERCER DAVIS,
Attorney of Defendant.

[File endorsement omitted.]
Service acknowledged this 21 day of February.

JOHN J. QUINN,
U. S. Attorney.
By W. ORVYL SCHALIC,
Assistant.

9 In United States District Court, District of New Jersey

[Title omitted.]

Motion to quash indictment

Filed Feb. 21, 1940

The defendant, Marie Kenny, moves the Court to quash the indictment in the above entitled matter on the ground that the said indictment does not allege an offense against the United States.

JAMES MERCER DAVIS,
Attorney.

[File endorsement omitted.]

11 In United States District Court, District of New Jersey

On Indictment. 8903b. On Motion of Defendant to Quash.

UNITED STATES OF AMERICA

vs.

MARIE KENNY, ALIAS MARIE RICKERT, ALIAS MAE KELLY,
DEFENDANT

James Mercer Davis, for the motion,
John J. Quinn (United States Attorney) by Joseph W. Burns (Special Assistant U. S. Attorney), opposed.

Memorandum opinion

Filed Feb. 14, 1940

AVIS, *District Judge*: The motion here is to quash the indictment because it is alleged that it does not charge an offense against the United States.

The same conditions exist as in the case of United States of America v. May Harris, Alias Kitty Harris (8911b), in which case I have this day filed a memorandum granting a motion to quash.

For the reasons stated in that memorandum, an order will be made quashing the indictment in the present case.

* * * * * *

[File endorsement omitted.]

12 In United States District Court, District of New Jersey

On Indictment. 8903b.

UNITED STATES OF AMERICA,

vs.

MARIE KENNY, ALIAS MARIE RICKERT, ALIAS MAE KELLY,
DEFENDANT.

Order Quashing Indictment

Filed Feb. 20, 1940

Motion having been made to quash the indictment made in the above cause on the ground that the said indictment does not

allege an offence against the United States, and the matter coming on to be heard in the presence of James Mercer Davis, Esq., Attorney for the defendant, and in the presence of Joseph W. Burns, Esq., Special Asst. U. S. Attorney, on behalf of the United States, and the Court having heard the argument of Counsel and inspected the indictment,

It is, on this 20th day of February, 1940, on motion of James Mercer Davis, Esq., Attorney of the defendant, ordered that the said indictment be and the same hereby is quashed, vacated, set aside and for nothing holden.

JOHN BOYD AVIS,
U. S. D. J.

[File endorsement omitted.]

13 In United States District Court, District of New Jersey

[Title omitted.]

Petition for Appeal

Filed March 20, 1940

Comes now the United States of America, plaintiff herein, and states that on the 20th day of February, 1940, the District Court for the District of New Jersey sustained a motion of the defendant to quash the indictment herein, and the United States of America feeling aggrieved at the ruling of said District Court in sustaining said motion to quash, prays that it may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a transcript of the record in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA,
JOHN J. QUINN,
United States Attorney for the District of New Jersey.
JOSEPH W. BURNS,
Special Assistant to the United States Attorney.

[File endorsement omitted.]

14 In United States District Court, District of New Jersey

[Title omitted.]

Assignments of Error

Filed March 20, 1940

Comes now the United States of America, by John J. Quinn, United States Attorney for the District of New Jersey, and avers that in the record proceedings and judgment herein there is manifest error and against the just rights of the said plaintiff in this, to wit:

1. That the court erred in quashing the indictment.

2. That the court erred in holding that the indictment did not charge an offense under the Perjury Statute.

3. That the court erred in holding that a false denial under oath by a witness before a grand jury that she had theretofore made certain statements to Government agents did not constitute a violation of the Perjury Statute, even though the fact that she had made the statements was material to the grand jury's inquiry.

JOHN J. QUINN,
United States Attorney for the District of New Jersey.

JOSEPH W. BURNS,
Special Assistant to the United States Attorney.

[File endorsement omitted.]

15 In United States District Court, District of New Jersey

[Title omitted.]

Order Allowing Appeal to the Supreme Court of the United States

Filed March 20, 1940

This cause having come on this day before the Court on Petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for a reversal of the judgment sustaining a motion of the defendant to quash the indictment in said cause, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said motion, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to

entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court, Ordered and Adjudged that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this Court, in sustaining the motion of the defendant to quash the indictment, to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court.

It is further Ordered that the United States of America be, and it is hereby, permitted a period of forty days in which to file and docket said appeal in the Supreme Court of the United States.

Dated at Camden, New Jersey, this 20th day of March 1940.

By the Court:

JOHN BYRD AVIS,
United States District Judge for the District of New Jersey.

16 In United States District Court, District of New Jersey

[Title omitted.]

Praecipe for Transcript of Record

Filed March 21, 1940

TO THE CLERK, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY:

The appellant hereby directs that in preparing the transcript of the record in this cause in the United States District Court for the District of New Jersey in connection with its appeal to the Supreme Court of the United States you include the following:

1. Indictment.
2. Notice of and motion to quash.
3. Opinion.
4. Judgment sustaining motion to quash.
5. Petition for appeal to the Supreme Court.
6. Statement of jurisdiction of Supreme Court.
7. Assignments of error.
8. Order allowing appeal.
9. Notice of service on appellee of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction, together with statement as to jurisdiction and opinion in the case of United States of America, appellant, v. May Harris, alias Kitty Harris, appellee, referred to therein.

10. Citation.
11. Praecipe.

JOHN J. QUINN,
United States Attorney for the District of New Jersey.
JOSEPH W. BURNS,
Special Assistant to the United States Attorney.

Service of the foregoing Praecipe for Transcript of Record is acknowledged this 21 day of March, 1940.

JAMES MERCER DAVIS,
Attorney for Defendant.

18 [Citation in usual form showing service on James Mercer Davis, filed April 17, 1940, omitted in printing.]

19 [Clerk's Certificate to foregoing transcript omitted in printing.]

20 In Supreme Court of the United States

[Title omitted.]

Statement of Points To Be Relied Upon and Designation of Record

Filed May 1, 1940

Pursuant to Rule XIII, Paragraph 9, of this Court, appellant states that it intends to rely upon all of the points in its assignment of errors.

Appellant deems the entire record; as filed in the above entitled cause, necessary for the consideration of the points relied upon.

FRANCIS BIDDLE,
Francis Biddle,
Solicitor General.

APRIL 20th, 1940.

Service of the above Statement of Points and Designation of Record acknowledged this 24 day of April, 1940.

JAMES MERCER DAVIS,
Counsel for Appellee.

[File endorsement omitted.]

[Endorsement on cover:] File No. 44,313. New Jersey, D. C. U. S., Term No. 906. The United States of America, appellant, vs. Marie Kenny, alias Marie Rickert, alias Mae Kelly. Filed April 12, 1940. Term No. 906 O. T. 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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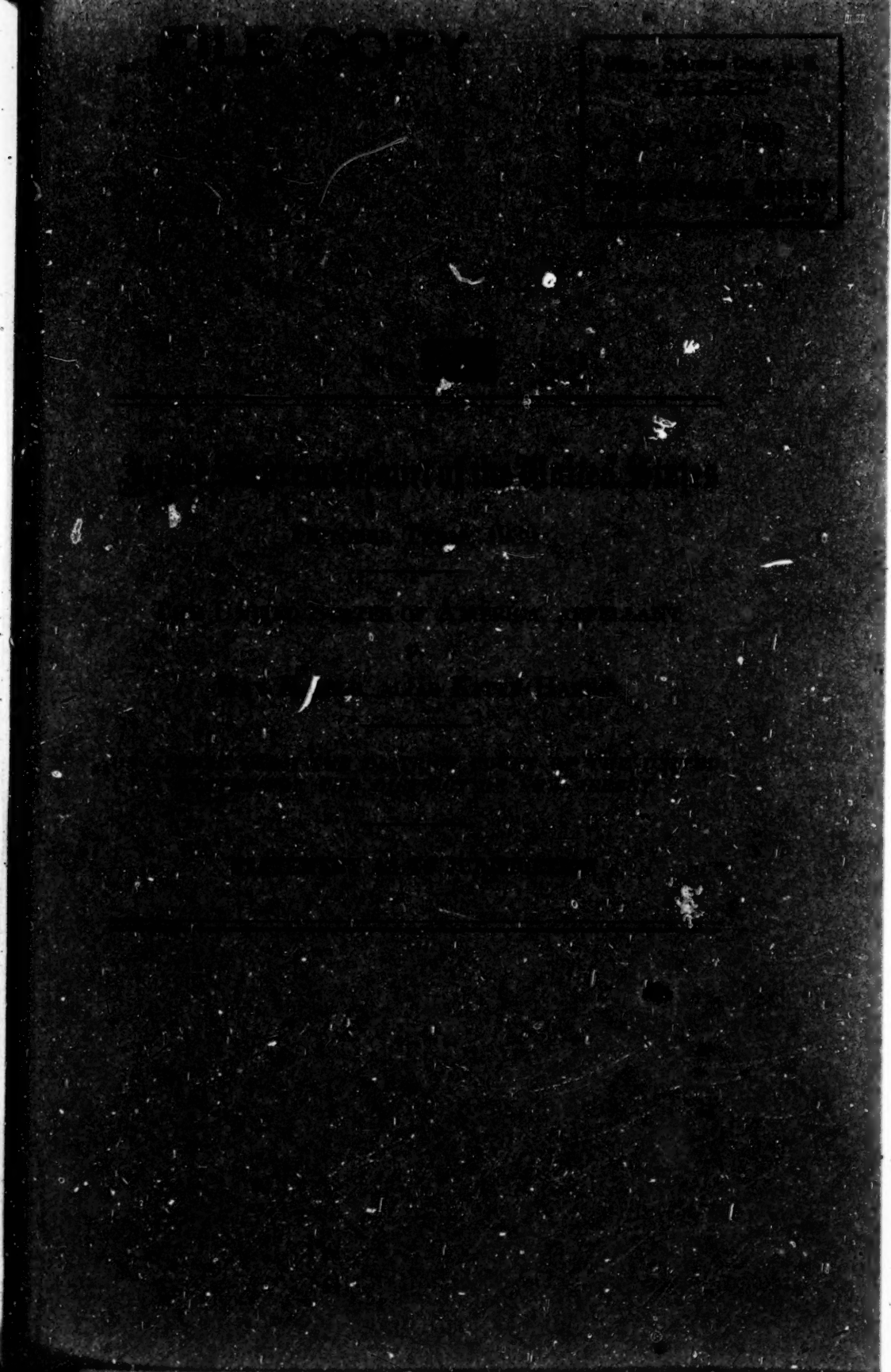

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In the United States District Court for the District of New Jersey

No. 8911b

UNITED STATES OF AMERICA

v.

MAY HARRIS, ALIAS KITTY HARRIS, DEFENDANT

STATEMENT OF JURISDICTION

(Filed March 20, 1940)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682 of the United States Code, otherwise known as the "Criminal Appeals Act," and by Section 345, Title 28, of the United States Code.

B. The statute of the United States, the construction of which is involved herein, is the Perjury Statute (Criminal Code, Section 125; U. S. C., Title 18, Section 231). This statute provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any

case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

C. The judgment of the District Court sought to be reviewed was entered on March 18, 1940, and the petition for appeal was filed on March 20, 1940, and is presented to the District Court herewith, to wit, on the 20th day of March 1940.

The indictment in this case contains a single count and is based upon the Perjury Statute, quoted *supra*. It charged that the defendant, having first taken an oath before a grand jury, swore falsely that she had not made certain statements to Government agents, the fact of such statements having been made being material to the inquiry conducted by the grand jury. Among the statements which the indictment alleged that the defendant made to the Government agents and which before the grand jury she denied making were that she had gone to one Ray Born in 1932 and talked to him about opening a house of prostitution; that she had spoken to one Lou Kissel at certain places in Atlantic City, New Jersey; and that she had

paid money to one James McCullough and had spoken to Born "after her place was closed at 29 North Michigan Avenue."

The defendant filed a motion to quash the indictment upon the ground that it did not charge an offense against the United States. This motion was sustained by the District Court in an order which stated that "the indictment does not charge an offense under the statute" [perjury statute].

The court conceded that the indictment sufficiently alleged that the grand jury was regularly convened, that the defendant was duly sworn as a witness, and that the questions asked of the defendant were material to the issue being investigated by the grand jury. It is also apparent that the indictment charged that the defendant's testimony before the grand jury that she had not made certain statements to the Government agents was knowingly false. The court nevertheless held that the indictment did not allege an offense under the Perjury Statute since it did not charge that her testimony before the grand jury was untrue in fact; *i. e.*, as we understand it, that it did not charge that her testimony before the grand jury that she had not talked to Ray Born in 1932 about opening a house of prostitution, etc., was untrue. In other words, the District Court construed the Perjury Statute as excluding from its purview those cases where a person under oath falsely denies having made a prior statement.

In support of its decision the court cites *Clayton* v. *United States*, 284 Fed. 537 (C. C. A. 4th), *Phair* v. *United States*, 60 F. (2d) 963 (C. C. A. 3d), and *United States* v. *Golan*, 24 F. Supp. 523 (E. D. Pa.). These cases are clearly not in point. Not only did they involve merely questions of proof, but in none of them was the charge of perjury based, as in the instant case, upon the false denial of the fact that certain statements had theretofore been made.

The distinction between perjury of the type involved in the cases upon which the court below relies and that charged in the instant case is well illustrated in the case of *O'Brien* v. *United States*, 99 F. (2d) 368 (App. D. C.).[1] In that case O'Brien, who had been assaulted and shot, made a written statement to police officers naming certain persons as his assailants. At the trial of these persons O'Brien testified that he did not remember making certain material parts of the statement and denied that he had made certain other material parts thereof. Because of the alleged falsity of this testimony he was indicted for perjury and convicted. On appeal he contended that the trial court improperly refused to permit him to introduce evidence that his statement to the police officers was procured from him by promises and

[1] In this case a motion for leave to proceed *in forma pauperis* was denied because the application for writ of certiorari was not timely filed (305 U. S. 562).

threats. In upholding the action of the trial court, the Court of Appeals said (pp. 368–369):

> * * * Ordinarily it is proper procedure, in a criminal case where an incriminating statement of the accused is claimed to have been obtained by duress, for the judge to hear the evidence and determine its admissibility out of the presence of the jury. But that rule has no application here, for the question was not the incriminating nature of the statement but whether, as charged in the indictment, the statement had in fact been made. If appellant had been indicted for the violation of the liquor laws which his statement revealed, proof that duress and coercion induced the statement would have rendered it inadmissible. But that is not this case. Or if the charge of the indictment had been that appellant, having first stated on oath that a certain fact was true, had later stated on oath that it was not true, and if appellant had defended on the ground that his first statement was made under duress, the admissibility of that statement might be questionable. *State* v. *Thornton*, 245 Mo. 436, 150 S. W. 1048. But that also is not this case. Instead, appellant was indicted for testifying under oath that a fact which indisputably occurred, did not occur. In that view the question is not whether appellant made the statement voluntarily or involuntarily or whether the statement made was true or false, for it was not the truth or falsity of what he said which

> was involved, but simply the fact of his having said it. The government's case in this aspect was directed to proof of that fact alone. We think the statement was properly admitted.

See also *Behrle* v. *United States*, 100 F. (2d) 714 (App. D. C.)

D. From what we have said it is apparent that the question presented is a substantial and important one. If the decision of the District Court is permitted to stand, it would follow that, where one had made statements before a grand jury in reliance upon which an indictment was returned against another, he could at the trial of such indictment with impunity deny having made such statements and thus often frustrate the prosecution and conviction of the defendant under indictment. Furthermore, if persons who make statements to Government agents investigating alleged federal offenses can, without fear of punishment, subsequently falsely deny under oath that they have given such statements, it is evident that the value of such statements as a link in the process of federal law enforcement will be seriously impaired.

E. The following decisions are believed to sustain the jurisdiction of the Supreme Court under that provision of the Criminal Appeals Act allowing a direct appeal to the Supreme Court "From a decision or judgment quashing * * * any indictment * * * where such decision or judg-

ment is based upon the * * * construction of the statute upon which the indictment is founded":

United States v. *Patten,* 226 U. S. 525, 535;

United States v. *Birdsall,* 233 U. S. 223, 230;

United States v. *Kapp,* 302 U. S. 214, 217;

United States v *Borden Co.,* No. 397, present Term, decided December 4, 1939.

Appended hereto is a copy of the opinion of the court rendered on February 15, 1940.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
JOHN J. QUINN,
United States Attorney.
JOSEPH W. BURNS,
Special Assistant to the United States Attorney.

[Endorsed:] Filed March 20, 1940, at 1:30 o'clock p. m.

BENJAMIN F. HAVENS,
Clerk.

In the United States District Court for the District of New Jersey

ON INDICTMENT 8911b

UNITED STATES OF AMERICA

v.

MAY HARRIS, ALIAS KITTY HARRIS, DEFENDANT

ON MOTION OF DEFENDANT TO QUASH

George R. Sommer, for the motion.

John J. Quinn (United States Attorney), by *Joseph W. Burns* (Special Assistant United States Attorney), opposed.

MEMORANDUM

AVIS, *District Judge:*

Defendant, through her attorney, moves to quash the indictment returned in this case, upon the ground that it does not charge an offense against the United States.

The indictment charges the defendant with having committed perjury in violation of the statute, 18 U. S. C. A. sec. 231.

The specific charge is that defendant, on October 17, 1939, was called as a witness before the United States Grand Jury for the District of New Jersey,

at Newark, duly sworn, and gave certain testimony, and was particularly interrogated as to statements made to F. B. I. agents in 1937. The defendant denied categorically that these alleged statements were made by her.

The allegation of the indictment is that—

> May Harris, alias Kitty Harris, at the said City of Newark, in the County, State, and District aforesaid, at the times she made the statements aforesaid, then and there well and fully knew that they were, as a matter of fact, false and untrue in that, and for the reason that, May Harris aforesaid then and there well and fully knew that she did in fact tell and inform the said Special Agents, A. Dickstein, E. R. Davis, and J. L. Brennan that she had gone to Ray Born in 1932 and talked to him about opening a house of prostitution at 219 North North Carolina Avenue; that she had spoken to Lou Kissel at the Ritz Carlton Hotel and at 110 South Iowa Avenue in Atlantic City, New Jersey; that she had paid money to said James McCullough and had spoken to Ray Born after her place was closed at 29 North Michigan Avenue.

The Government, by its Attorney, admits and states that its case is based entirely upon the fact that defendant, as a witness before the Grand Jury, denied that she made certain statements to the agents, whereas in fact she did make such statements. In other words, the Government insists

that the indictment should be upheld, although no direct proof of the falsity or truth of the testimony given before the Grand Jury is available, except the testimony of agents who will testify that, at a prior meeting, the defendant told them as facts, the statements contained in the questions submitted to defendant before the Grand Jury.

Counsel for defendant claims that under such an allegation the indictment cannot be sustained; that to allege or prove perjury it must be shown that the substance of the statements of defendant were untrue in fact, and that defendant cannot be convicted of perjury because her sworn testimony was in conflict with an alleged statement made by her on a former date.

Undoubtedly at the time the testimony was given the Grand Jury was regularly convened and the witness duly sworn, or so it is alleged in the indictment.

I am satisfied that, under the terms of the indictment, the questions asked of defendant were material to the issue there being investigated.

Perjury is a serious offense, and a person who commits perjury is entitled to severe condemnation. The courts and other bodies depending upon facts for adjustment of controversies, or obtaining facts by investigation, are powerless to render proper determinations unless persons in testifying tell the truth to the best of their knowledge. However, by reason of the seriousness of the charge and

its peculiar attributes, it is required that perjury be proven by the testimony of two credible witnesses, or one credible witness with corroboration, or circumstances sustained by clear and convincing proof.

While there are some cases which appear to be to the contrary, I am satisfied that the allegations in an indictment necessary to show the commission of the offense must charge that the testimony given was untrue in fact, and that perjury cannot be predicated upon a contrary statement made by the witness at a time prior to or after the making of the sworn statement, notwithstanding the claim that the witness on her oath denied that she made such statements, which, it is averred, can be proven by two or more credible witnesses.

In the case of *Clayton* v. *United States,* 4 Circ. 284 F. 537, the court said on page 540:

> In the case at bar no attempt was made to prove by "positive and direct evidence" that defendant made false answers to the first two questions set out in the indictment, namely, whether he had procured any intoxicating liquor from any person during the period named, and whether he had had any intoxicating liquor in his possession during that period. Indeed, the only evidence in support of these assignments is the testimony of two witnesses as to what defendant had told them in private conversation some time before the grand jury met. This was quite insufficient, for the falsity of

> a sworn statement is not shown by proof of an unsworn contradictory statement. In view of the strong presumption of innocence, and because of the solemnity of an oath, credit must be given to what defendant said under oath, rather than to what he may have said to the contrary when not under oath. *Billingsley* v. *State*, 49 Tex. Cr. R. 620, 95 S. W. 520, 13 Ann. Cas. 730, 21 R. C. L. 272; 30 Cyc. 1455; Whatrton's Crim. Ev. sec. 387.

In *Phair* v. *United States*, 60 F. 2d 953, the Circuit Court of Appeals for the Third Circuit, in a case appealed from a judgment rendered in the District Court of the United States for the District of New Jersey, established the same principle.

In that case Phair was alleged to have subscribed and sworn to an affidavit with relation to the ownership of a certain saloon wherein intoxicating liquor was kept and sold. In the affidavit he denied ownership. It was charged that later in another proceeding Phair admitted ownership. There was some question as to whether the admission referred to the exact property referred to in the affidavit, but, however that may be, the court stated the law applicable to the instant motion as follows on page 954:

> But assuming that Mr. Cohen, and not the other witnesses, correctly stated what Phair said, it simply amounts to an affidavit on the one side and contrary oral statements by the same person on the other. The affidavit and

the later statements cannot both be true, and which one is true is unknown, for there are no corroborating circumstances sufficient to establish the truth of the statements contradicting the affidavit.

* * * * *

At most, there was an oath on the one side, and conflicting testimony as to what Phair later said contrary thereto, on the other, without sufficient attending circumstances. If all three witnesses had unequivocally testified that Phair later flatly denied the truth of the statements made in his affidavit, the result would have been an affidavit by Phair and a subsequent denial of it by him. All that the testimony of the three witnesses amounts to is the establishment of a denial by Phair of his affidavit, and the mere denial of the truth of the affidavit is not sufficient to sustain the charge of perjury.

The case of *United States* v. *Golan*, D. C., 24 F. Supp. 523, decided by Judge Maris, then Circuit Judge, but determining a motion for a new trial in a case in which he had sat as a District Judge, held as follows on pages 523–4:

Turning to a consideration of the common law of Pennsylvania I find it to be settled that two or more contradictory statements of a defendant standing alone will not sustain a charge of perjury. *Com.* v. *Bradley*, 109 Pa. Super. 294, 167 A. 471. Before a defendant may be convicted upon his admission that a prior statement under oath was

false, it is necessary to establish the corpus delicti, that is, the falsity of the defendant's prior sworn statement. *Com.* v. *Haines,* 130 Pa. Super. 196, 196 A, 621.

In the present case the Government offered evidence proving that the defendant gave the testimony and made the affidavit in his naturalization proceeding which it contended were false. It then offered in evidence certain admissions by the defendant that this testimony and affidavit were false. No other evidence as to their falsity was produced, however, and I submitted the case to the jury upon the contradictory statements of the defendant alone and over his objection that the corpus delicti had not been proved. I am satisfied that this was error and that I should have sustained the defendant's motion for a directed verdict of not guilty.

These cases are convincing as to the rule established in this Circuit, and it is my duty to follow the rule so established.

The Government relies mainly upon two cases: The first, *O'Brien* v. *United States,* C. A. D. C., 99 F. 2d 368. While it is true in that case the court sustained a conviction based upon the making of contradictory statements, the question as to whether that constituted perjury was not raised or decided. The first question decided was whether the statement, made by defendant, which constituted the proof of perjury had been procured by promises and threats. The second, an alleged com-

mission of error by the trial court in permitting the stenographer who recorded the original statement to read to the jury those parts of it which proved the defendant's commission of other criminal offenses, and the third related to the imposition of sentence, as to whether defendant should have been sentenced under the District of Columbia Code or the Federal Penal Code. It is not a precedent for the contention. Petition for writ of certiorari to the Supreme Court was filed, including a motion to proceed in forma pauperis, which motion was denied (see 305 U. S. 502). Apparently no further proceedings were taken in the Supreme Court.

The second case is *Behrle* v. *United States,* C. A. D. C. 100 F. 2d 714. That case seems to be exactly in point, following the doctrine established in the case of *People* v. *Doody,* 172 N. Y. 165, 64 N. E. 807.

In both of these cases the courts apparently relied upon the principle that perjury can be proved by so-called circumstantial evidence. I cannot believe that the courts can make new law on this subject, when for so many years it has been held otherwise.

The motion to quash will be granted.

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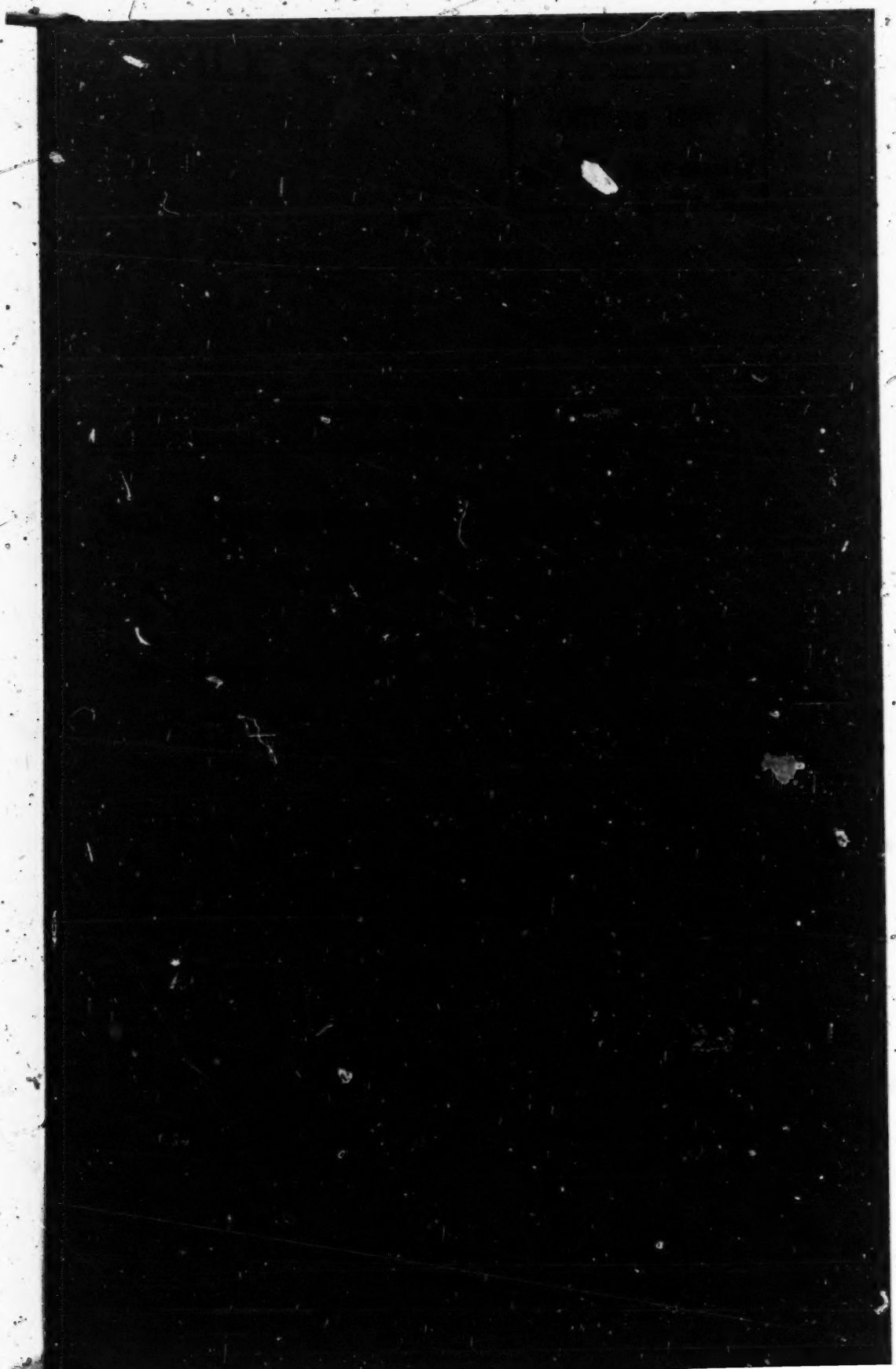

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 52

THE UNITED STATES OF AMERICA, APPELLANT

v.

MAY HARRIS, ALIAS KITTY HARRIS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 10–13) is not reported.

JURISDICTION

The order of the court below quashing the indictment was entered March 18, 1940 (R. 14). The Government applied for (R. 14) and was allowed an appeal on March 20, 1940 (R. 15–16). Probable jurisdiction was noted by this Court May 6, 1940. The jurisdiction of this Court is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended (U. S. C., Title 18, Sec. 682), otherwise known as the Criminal Appeals

Act, and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Title 28, Sec. 345).

QUESTION PRESENTED

Whether an indictment alleging that a witness before a grand jury willfully testified falsely that she did not make certain statements to Government agents charges the offense of perjury under Section 125 of the Criminal Code.

STATUTE INVOLVED

Criminal Code, Section 125 (U. S. C., Title 18, Sec. 231):

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

STATEMENT

The appellant, hereinafter called the defendant, was indicted on October 17, 1939, in the United States District Court for the District of New

Jersey for the crime of perjury under Section 125 of the Criminal Code (R. 1–9). The indictment, which was in one count, charged, in substance, that on October 11, 1939, the defendant was duly sworn as a witness before a lawfully constituted grand jury investigating violations of the income-tax laws; that certain of her testimony set forth in the indictment (R. 5–8) to the effect that she did not make various statements in 1937 to three Government agents [1] was wilfully false in that, as she well

[1] Among the questions and answers set forth in the indictment were the following:

"Q. Now, in October 1937, or thereabouts, did you say to Agents Dickstein, Brennan, and Davis or any of those three that in May of 1932 you went to Ray Born's home in your car in the Inlet District of Atlantic City, N. J.; that you said to Ray Born, 'Everybody is open; how about me? I am back in 219; shall I turn on my lights?' Did you say that to the agents?

"A. I couldn't have; I was closed in 1932. [R. 5.]

* * * * *

"Q. Did you tell the F. B. I. agent in 1937 that you had gone to Johnson's apartment in the Ritz Carlton to see Lou Kissel?

"A. No; the F. B. I. agents was trying to tell me that I had.

"Q. You didn't say that to them?

"A. No. [R. 6.]

* * * * *

"Q. Well, did you say this to the agents after you talked about the colored attorney and the colored people, that within a few days you went to see Ray Born at Turner Hall, and after some effort was able to contact him on the telephone and demanded that he wait at Turner Hall until you got there; that a few minutes later you saw him and said, 'I don't know who is the cause, I don't care who is the cause, I

knew, she did state to the agents that she had gone to Ray Born in 1932 and talked to him about opening a house of prostitution in Atlantic City, that she had spoken to Lou Kissell at certain places in Atlantic City and that she had paid money to James McCullough and had spoken to Born "after her place was closed at 29 North Michigan Avenue" (R. 8). The indictment further alleged that

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am tired of being tossed around; why should I be closed and why should these niggers get all of a sudden so particular? I am satisfied that 15 North Michigan is the cause and if I don't open those women better get closed up and that Ray Born said, 'Go on home; don't get excited; I am trying to straighten you out.' That the next day the lights at 15 North Michigan Avenue were out. Did you say that to the F. B. I. agents?

"A. I was never in Turners Hall.

"Q. Did you tell the agents that you were in Turners Hall?

"A. Why would I tell the agents about something that I didn't do.

"Q. I am asking if you did.

"A. I couldn't have. I have never been in Turners Hall.

"Q. You didn't tell that to the agents?

"A. I couldn't have; I don't see how I could.

"Q. Did you tell the agents that you had this conversation with Ray Born?

"A. I didn't have a conversation with Ray Born.

"Q. Did you tell the agents that you had that conversation with Ray Born?

"A. I don't see how I would. I wouldn't tell the F. B. I. agents something that didn't happen to be effective about it. I have never been in Turners Hall; why would I tell them that I had been? [R. 6–7.]

"Q. Did you say this to the agents, that shortly after your house and Poppy's house were allowed to open in the summer

whether the defendant made these statements to the Government agents was a matter material to the inquiry conducted by the grand jury, the other matters alleged to be material being whether the proprietors of houses of prostitution in Atlantic City obtained permission to conduct their business without official molestation, what payments were made for such permission and to whom they were made, whether certain individuals, including James McCullough, received payments and delivered them to Raymond R. Born and whether Born, Undersheriff of Atlantic County, New Jersey, gave assurances of protection (R. 3–4).

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of 1936 a young man who you were told by the agents was James McCullough, but whose name you did not know at the time, came to your house; that you recognized him as being a man whom you had seen at Slotty's place on North Kentucky Avenue when you previously made payments there for your houses on North North Carolina Avenue; that this young man said to you, 'Do you want to see me today?' That you said, 'I will see you Sunday and every Sunday; I prefer Sunday.' Did you say that to the agents?

"A. Couldn't of. The first time that I saw this boy that you all call McCullough was right here in this hall outside of this door this last month some time. [R. 7.]

* * * * *

"Q. Didn't you tell these agents on October 27, 1937, or if you don't remember the date, didn't you tell the agents about that time that you recognized James McCullough as a man who collected the money?

"A. I told them that this man that I thought looked like the man I had seen in this man's office after that I discovered that it was not the man and it was this woman's driver. In this hall here when they really showed me the boy, then it was not the man I saw in Trenton. [R. 8.]

On January 16, 1940, the defendant filed a motion to quash the indictment on the ground that it did not charge an offense against the United States (R. 9). On February 14, 1940, the District Court filed an opinion sustaining the motion (R. 10–13), and on March 18, it ordered the indictment quashed, having, as the order stated, "determined that the indictment does not charge an offense under the statute" (R. 14).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that a false denial under oath by a witness before a grand jury that she had theretofore made certain statements to Government agents did not constitute a violation of the perjury statute, even though the fact that she had made the statements was material to the grand jury inquiry;

2. In holding that the indictment did not charge an offense under the perjury statute;

3. In quashing the indictment.

SUMMARY OF ARGUMENT

The decision of the District Court excluded from the scope of the perjury statute those cases where a person under oath falsely denies having made a prior statement. In reaching this result, the court disregarded the obvious distinction between a false denial of the fact that a previous statement was made and a contradiction of the previous statement. It, therefore, relied upon inapplicable deci-

sions, holding that evidence that the defendant made a contradictory statement at another time was insufficient to prove the falsity of the perjurious statement alleged.

There is no authority for the view that the perjury statute affords a special immunity to a wilfully false denial of the *fact* that a previous statement was made. There is, on the contrary, authority that it does not. The denial of the fact that certain statements have been made may obviously be as clear, deliberate, and material falsehood as the denial of any other fact. An exemption from liability for such false denials will, moreover, significantly enhance the difficulties of prosecution, since statements made to Government agents in the course of their investigations or to grand juries are inevitably one of the bases upon which criminal proceedings are instituted and indictments returned.

ARGUMENT

THE DISTRICT COURT ERRONEOUSLY EXCLUDED FROM THE SCOPE OF THE PERJURY STATUTE A WILLFULLY FALSE DENIAL THAT A PREVIOUS STATEMENT WAS MADE

The opinion of the District Court concedes that the indictment sufficiently alleged that the grand jury was regularly convened, that the defendant was duly sworn as a witness, and that the questions asked of her were material to the issue being in-

vestigated (R. 11).[2] It properly states that the Government's case "is based entirely upon the fact that defendant, as a witness before the Grand Jury, denied that she made certain statements to the agents, whereas in fact she did make such statements" (R. 10). The opinion does not question either the sufficiency of the defendant's testimony as set forth in the indictment to constitute denials, categorical or argumentative, that she made the previous statements alleged or the sufficiency of the allegations that the denials were knowingly false. Nevertheless, the court held that the indictment failed to allege an offense under the statute because "the allegations in an indictment necessary to show the commission of the offense

[2] This Court has held that it is sufficient in an indictment for perjury either to allege materiality generally or to allege a false statement which appears on its face to be material. *Markham* v. *United States*, 160 U. S. 319, 325; *Hendricks* v. *United States*, 223 U. S. 178, 184. See also *Woolley* v. *United States*, 97 F. (2d) 258, 261 (C. C. A. 9th), certiorari denied, 305 U. S. 614. The indictment alleged that the defendant's false testimony was material. (R. 3, 4–5.) Moreover, its materiality is apparent, since her false denial bore directly on her credibility as a witness (*cf. Luse* v. *United States*, 64 F. (2d) 776, 777 (C. C. A. 9th); certiorari denied, 290 U. S. 651; *Claiborne* v. *United States*, 77 F. (2d) 682, 691 (C. C. A. 8th); *United States* v. *Slutzky*, 79 F. (2d) 504, 505 (C. C. A. 3d); *Blackmon* v. *United States*, 108 F. (2d) 572, 573 (C. C. A. 5th)), and, as the indictment alleged (R. 5), tended to obstruct the grand jury investigation (*Carroll* v. *United States*, 16 F. (2d) 951, 953 (C. C. A. 2d), certiorari denied, 273 U. S. 763; *State* v. *True*, 135 Me. 96, 100; *State* v. *Sang*, 184 Wash. 444, 449. See also *Woolley* v. *United States*, *supra*; *United*

must charge that the testimony given was untrue in fact, and * * * perjury cannot be predicated upon a contrary statement made by the witness at a time prior to or after the making of the sworn statement, notwithstanding the claim that the witness on her oath denied that she made such statements, which, it is averred, can be proven by two or more credible witnesses." (R. 11.) Thus the District Court treated a charge of perjury founded on a false denial that a previous statement was made as the legal equivalent of a charge that the defendant made contradictory statements. The effect of the decision is to exclude from the scope of the perjury statute those cases where a person under oath falsely denies having made a prior statement.

That the court below regarded as immaterial the obvious distinction between a false denial of the fact that a previous statement was made and a contradiction of the previous statement is fully indicated by the decisions upon which the court relied.[3] These decisions held that evidence of a contradictory statement made by the defendant at another

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States v. *Creech*, 21 F. Supp. 439, 440 (D. D. C.)). The decision in *Leak* v. *State*, 61 Ark. 599, that a denial that an earlier statement had been made is immaterial ignores both these grounds of materiality.

[3] *Clayton* v. *United States*, 284 Fed. 537 (C. C. A. 4th); *Phair* v. *United States*, 60 F. (2d) 953 (C. C. A. 3d); *United States* v. *Golan*, 24 F. Supp. 523 (E. D. Pa.).

time was insufficient to prove the falsity of the perjurious statement alleged, whether they are supported by the fact that the law of contradiction does not indicate which of two contradictories is false, need not be determined in the present case.[4] Whatever their validity, they are inapplicable where the charge, as the court below recognized, is not that the defendant falsely denied the truth of her former statements but that she falsely denied that she made them. The distinction turns on whether the truth of the former statement or only the fact that it was made is employed to establish the falsity of the perjurious statement alleged. The logical analogy is the doctrine that the hearsay rule does not apply to an extrajudicial statement when offered circumstantially to prove something other than the truth of the statement. See Wigmore, *Evidence* (3d ed.) § 1788.

While there is thus no authority for the view that the perjury statute affords a special immunity to willfully false denials of the fact that a previous statement was made, there is authority that it does not. In *O'Brien* v. *United States,* 99 F. (2d) 368 (App. D. C.), certiorari denied, 305 U. S. 562, the defendant had stated to the police that he had been assaulted by certain persons. When those whom

[4] That the nature of the contradictory statements or the circumstances under which they are made may sometimes suffice to permit a jury to determine which is false is indicated by the decision of this Court in *United States* v. *Wood,* 14 Pet. 430. See also Wigmore on Evidence (3d ed.) § 2043.

he named as his assailants were brought to trial, the defendant was called as a witness against them. He testified, among other things, that he had not made certain material parts of the statement. Because of the alleged falsity of this testimony, he was tried and convicted of perjury. On appeal, the defendant urged that the trial court erred in admitting in evidence the statement he had made to the police because it had been procured by threats and promises. In sustaining the conviction, the Court of Appeals declared that the sole issue in the perjury prosecution was whether the defendant falsely denied having made the statement. Consequently, the court held the evidence was properly admitted, despite the claim of duress, because (p. 369) "it was not the truth or falsity of what he said which was involved, but simply the fact of his having said it."

The *O'Brien* case did not, as the opinion below states (R. 13), sustain "a conviction based upon the making of contradictory statements". The Court of Appeals stated in unambiguous terms (p. 369) that the conviction was based upon the defendant's testimony that "a fact which indisputably occurred [the making of the statement], did not occur." And while it is true that the precise question before the Court of Appeals in the *O'Brien* case was the admissibility of the statement, the decision is clear authority for the position that a false denial of the material fact that a certain statement

had been made constitutes perjury, regardless of the truth or falsity of the statement itself.[5]

The Government's position that a false denial of the fact that a previous statement was made may constitute perjury, regardless of the truth or falsity of the prior statement, is also upheld by decisions of state courts.[6]

The elements of perjury under the statute are, as this Court has indicated, that the sworn statement must be deliberately untrue and that it be material. *United States* v. *Norris*, 300 U. S. 564, 574. If the decision of the District Court is permitted to stand, an exception will have been established which creates a wholly unwarranted differentiation among persons who make willfully false statements. The denial of the fact that certain statements have been made may obviously be as clear, deliberate, and material a falsehood as the denial of any other fact. Such an exception may, moreover, substantially impede the effective administration of criminal law. Statements made to Government agents in the course of their investigations or to grand juries are

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[5] A similar result was reached by the same court in *Behrle* v. *United States*, 100 F. (2d) 714, where the defendant's false testimony was not that he did not make the former statement but that he did not remember having made it. This distinction presented an additional evidential problem, but the principle determinative of liability is the same.

[6] *State* v. *True*, 135 Me. 96; *Whitaker* v. *State*, 37 Tex. Crim. 479; *Polke* v. *State*, 134 Tex. Crim. 496; *Papas* v. *People*, 98 Colo. 306; *State* v. *Studer*, 54 Ohio App. 417; *State* v. *Terry*, 50 Idaho 283.

inevitably one of the bases upon which criminal proceedings are instituted and indictments returned. If the fact that such statements have been made may subsequently be denied with impunity, it is evident that the difficulties of prosection will be significantly enhanced. No justification either in law or in policy has been adduced for this result.

CONCLUSION

The indictment charged an offense under the perjury statute, and it is therefore respectfully submitted that the order of the District Court quashing the indictment should be reversed.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
JOSEPH W. BURNS,
HERBERT WECHSLER,
Special Assistants to the Attorney General.

OCTOBER 1940.

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FILE COPY

No. [redacted] 53

In the Supreme Court of the United States

October Term, 1943

THE UNITED STATES OF AMERICA, APPELLANT

v.

MARIE KIRENT, ALIAS MARIE RICHERT, ALIAS MARIE [redacted]

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF THE CANAL ZONE

STATEMENT AS TO JURISDICTION

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In the United States District Court for the District of New Jersey

No. 8903b

UNITED STATES OF AMERICA

v.

MARIE KENNY, ALIAS MARIE RICKERT, ALIAS MAE KELLY, DEFENDANT

STATEMENT OF JURISDICTION

(Filed March 20, 1940)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682 of the United States Code, otherwise known as the "Criminal Appeals Act," and by Section 345, Title 28, of the United States Code.

B. The statute of the United States, the construction of which is involved herein, is the Per-

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jury Statute Criminal Code, Section 125; U. S. C., Title 18, Section 231). This statute provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

C. The judgment of the District Court sought to be reviewed was entered on February 20, 1940, and the petition for appeal was filed on March 20, 1940, and is presented to the District Court herewith, to wit, on the 20th day of March 1940.

The indictment in this case contains a single count and is based upon the Perjury Statute, quoted *supra*. It charged that the defendant, having first taken an oath before a grand jury, swore falsely that she had not made certain statements to Government agents, the fact of such statements having been made being material to the inquiry conducted by the grand jury. Among the statements which the indictment alleged that the defendant made to the Government agents and which before the grand jury she denied making were that she had gone to one Ray Born for permission to

open a house of prostitution in Atlantic City, New Jersey, and that she operated such a house after speaking to Born in 1935.

The defendant filed a motion to quash the indictment upon the ground that it did not charge an offense against the United States. This motion was sustained by the District Court. The memorandum opinion of the court rendered on February 15, 1940, appended hereto, states that the indictment did not charge an offense under the Perjury Statute for the same reasons as were set forth in its opinion filed in the companion case of *United States* v. *May Harris, alias Kitty Harris,* No. 8911b, in which the United States is likewise appealing.

D. Since the question involved in this case is the same as that presented in the *Harris* case, there is hereby incorporated by reference the pertinent portions of paragraphs C, D, and E of the Government's Statement of Jurisdiction in that case.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

JOHN J. QUINN,
United States Attorney.

JOSEPH W. BURNS,
Special Assistant to the United States Attorney.

[Endorsed:] Filed March 20, 1940, at 1:30 o'clock p. m.

BENJAMIN F. HAVENS,
Clerk.

In the United States District Court for the District of New Jersey

ON INDICTMENT 8903b

UNITED STATES OF AMERICA

v.

MARIE KENNY, ALIAS MARIE RICKERT, ALIAS MAE KELLY, DEFENDANT

ON MOTION OF DEFENDANT TO QUASH

James Mercer Davis, for the Motion.

John J. Quinn (United States Attorney) by *Joseph W. Burns* (Special Assistant United States Attorney), opposed.

MEMORANDUM

AVIS, *District Judge:*

The motion here is to quash the indictment because it is alleged that it does not charge an offense against the United States.

The same conditions exist as in the case of *United States of America* v. *May Harris, alias Kitty Harris* (8911b), in which case I have this day filed a memorandum granting a motion to quash.

For the reasons stated in that memorandum, an order will be made quashing the indictment in the present case.

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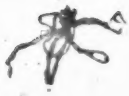

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 53

THE UNITED STATES OF AMERICA, APPELLANT

v.

MARIE KENNY, ALIAS MARIE RICKERT, ALIAS MAE KELLY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the District Court (R. 7) is not reported.

JURISDICTION

The order of the court below quashing the indictment was entered February 20, 1940 (R. 7–8). The Government applied for (R. 8) and was allowed an appeal on March 20, 1940 (R. 9). Probable jurisdiction was noted by this Court May 6, 1940. The jurisdiction of this Court is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended (U. S. C., Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and

by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Title 28, Sec. 345).

QUESTION PRESENTED

Whether an indictment alleging that a witness before a grand jury willfully testified falsely that she did not make certain statements to Government agents charges the offense of perjury under Section 125 of the Criminal Code.

STATUTE INVOLVED

Criminal Code, Section 125 (U. S. C., Title 18, Sec. 231):

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

STATEMENT

The appellee, hereinafter called the defendant, was indicted on October 11, 1939, in the United States District Court for the District of New Jersey for the crime of perjury under Section 125 of the

Criminal Code (R. 1–5). The indictment, which was in one count, charged in substance that on August 8, 1939, the defendant was duly sworn as a witness before a lawfully constituted grand jury investigating violations of the income tax laws; that certain of her testimony set forth in the indictment (R. 4–5) to the effect that she did not make various statements to Government agents[1] was false in that,

[1] The following questions and answers were set forth in the indictment (R. 4–5):

"Q. Well, don't you recall at that time that you told me that you had gone to Ray Born for permission to open a house?

"A. I did not. I didn't mention—because, after all, I do know law. I told you I had been indicted.

"Q. You never told me?

"A. No; I didn't. That's the reason I said, 'If you want to ask me anything or to sign that paper, you should send it to my attorney,' and if he said I should do it, naturally I would do it, because I had only become indicted.

* * * * * * *

"Q. Mrs. Kenny, do you mean to tell this Grand Jury that when Special Agent Frank was questioning you, you didn't tell him that you asked Ray Born for permission to open?

"A. I did not.

"Q. Didn't he ask you whether or not you had any expenses for protection, and didn't you tell him about the $50 and $100, and also say that you started the house after speaking to Ray Born?

"A. No; I didn't. I said I put it in an envelope, told him what it was, told him that I put $50 like in the winter and $100 in the summer, and then he asked me something about other donations, like for charity, and I tried to the best of my ability to tell him the amount, which was something I really couldn't exactly tell, because sometimes there was a lot and sometimes a little, but I never answered that question at that time to Mr. what's-his-name, because after all, I did know my statue at that time."

as she well know, she did state to two agents that she had gone to Ray Born for permission to open a house of prostitution in Atlantic City and that she operated such a house after speaking to Ray Born in 1935 (R. 5). The indictment further alleged that whether the defendant made these statements to the Government agents was a matter material to the inquiry conducted by the grand jury, the other matters alleged to be material being whether the proprietors of houses of prostitution in Atlantic City obtained permission to conduct their business without official molestation, what payments were made for such permission, and to whom they were made, whether they were made to certain individuals, and whether Raymond R. Born, Undersheriff of Atlantic County, New Jersey, received for such permission income which he failed to report (R. 3–4).

The defendant moved to quash the indictment on the ground that it did not charge an offense against the United States. In a memorandum opinion (R. 7) filed February 14, 1940, the District Court held that the indictment did not charge an offense under Section 125 of the Criminal Code, stating that "The same conditions exist" as in *United States* v. *May Harris, alias Kitty Harris* (No. 52, October Term, 1940), and referring to the reasons set forth in its opinion in the companion case. On February 20, 1940, the District Court entered an order quashing the indictment (R. 7–8).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that a false denial under oath by a witness before a grand jury that she had theretofore made certain statements to Government agents did not constitute a violation of Section 125 of the Criminal Code, even though the fact that she had made the statements was material to the grand jury inquiry;

2. In holding that the indictment did not charge an offense under Section 125 of the Criminal Code;

3. In quashing the indictment.

ARGUMENT

The question involved in this case is identical with that presented in *United States* v. *Harris*, No. 52, October Term, 1940. Reference is therefore made to our brief in the *Harris* case for the argument in support of the Government's position.

CONCLUSION

It is respectfully submitted that the order of the District Court should be reversed.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
JOSEPH W. BURNS,
HERBERT WECHSLER,
Special Assistants to the Attorney General.

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SUPREME COURT OF THE UNITED STATES.

Nos. 52, 53.—October Term, 1940.

52 United States, *vs.* May Harris.

53 United States, *vs.* Marie Kenny.

Appeals from the United States District Court for the District of New Jersey.

[December 9, 1940.]

Mr. Justice Murphy delivered the opinion of the Court.

In a proceeding before a grand jury, appellees were asked whether, in 1937, they had made certain statements to government agents concerning earlier conversations with one Ray Born and others regarding the operation of places of ill repute. They denied having made the statements. The grand jury thereupon found the indictments[1] now before us which charge, in effect, that appellees' testimony was false, that it was material to the investigation of the grand jury, and that appellees therefore committed perjury in violation of Section 125 of the Criminal Code (35 Stat. 1111, 18 U. S. C. § 231).[2]

Appellees promptly moved to quash the indictments on the ground that they failed "to charge an offense against the United States". After hearing on the motions, the trial judge entered orders in both cases quashing the indictments because they did not charge an offense under the statute. The cases are here on appeals from these

[1] Although appellees were indicted separately, the indictments in all material respects are identical, and the appeals present the same question. They are therefore treated in one opinion.

[2] Section 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

rulings. 18 U. S. C. § 682, 28 U. S. C. § 345; see *United States* v. *Borden*, 308 U. S. 188, 193.

The sole question presented by the two cases is whether the indictments charge an offense under the statute. The indictment against May Harris alleged that " . . . the said May Harris . . . at the times she made the statements aforesaid [before the grand jury], then and there well and fully knew that they were, as a matter of fact, false and untrue in that, and for the reason that, May Harris aforesaid then and there well and fully knew that she did in fact tell and inform the said Special Agents . . . that she had gone to Ray Born in 1932 and talked to him . . . ; that she had spoken to Lou Kissel . . . ; that she had paid money to said James McCullough. . . ."[3]

The trial judge apparently thought that the alleged perjury consisted of contradicting, before the grand jury, the earlier statements made by appellees in conversations with Born and others, for in the opinion accompanying the orders quashing the indictments he stated: " . . . I am satisfied . . . that perjury cannot be predicated upon a contrary statement made by the witness at a time prior to or after the making of the sworn statement, notwithstanding the claim that the witness on her oath denied that she made such statements, which, it is averred, can be proven by two or more credible witnesses." He cited several cases to show that mere proof of prior inconsistent or contradictory statements would not support a charge of perjury. See *Phair* v. *United States*, 60 F. (2d) 953, 954; *Clayton* v. *United States*, 284 Fed. 537, 540.

It is evident, however, that the indictment charged perjury not in the mere making of contradictory and inconsistent statements concerning these conversations, but in swearing falsely before the grand jury that appellees had never told the government agents they had had such conversations. Moreover, proof that appellees had told government agents that they had conversed with Born and others would not be evidence of mere previous inconsistent or contradictory statements by appellees affecting only their credibility as witnesses, but would be direct evidence of the offense itself and hence would support the charge made in the indictment. The difference between the instant cases and such cases as *Phair* v. *United States*,

[3] The charge in the indictment against Marie Kenny, *mutatis mutandis*, is identical with the one quoted.

60 F. (2d) 953, therefore, is obvious and substantial. See *O'Brien* v. *United States,* 99 F. (2d) 368.

Section 125 of the Criminal Code makes no distinction between the false assertions of the fact of prior statements and the false assertions of any other fact. Nor can we see any reason to make one. As the government points out, the denial of the fact that certain statements have been made may be equally as clear, deliberate, and material a falsehood as the denial of any other fact. And since statements made to government agents are generally one of the bases upon which criminal proceedings are instituted and indictments returned, such a distinction might substantially impede effective administration of criminal law.

The facts stated in the indictment are clearly sufficient to charge a violation of the perjury statute. Accordingly, the orders quashing the indictments are reversed and the cause is remanded.

Reversed and remanded.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END